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No. 04-47

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

CHRIS BARBER *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Arkansas Supreme Court erred when it held—in conflict with the standards established by this Court and other lower courts—that the punitive damages award conformed to due process.

2. Whether the Arkansas Supreme Court violated the Supremacy Clause when it held—in conflict with the rule followed by this Court and the Courts of Appeals for over a century—that it could affirm the general verdict of a jury permitted to consider a federally preempted theory of negligence so long as the jury might have based its verdict on an alternate theory.

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75% of the rail industry's line haul mileage, produce 93% of its freight revenues, and employ 91% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR believes that its familiarity with the history and operation of rail crossings, as well as its appreciation of the consequences of the decision below, will aid this Court's understanding of the issues presented here. Accordingly, among other topics, this brief provides background information about the rail crossing system that underlies the verdict in this case.

Both of the questions presented are of substantial concern to AAR's members, for both implicate the safe and efficient operation of rail systems. Because plaintiffs whose claims arise from railroad crossing accidents often seek punitive damages against railroads, AAR has a strong interest in the enforcement of constitutional limitations on punitive awards. With regard to federal preemption, the import of this case is plain. In the Federal Railroad Safety Act, Congress granted the Department of Transportation authority to regulate rail safety. DOT regulations preempt state law covering the same subject matter, and this Court has recognized that DOT's comprehensive regulations governing the speed at which trains travel have broad preemptive effect. Yet, under the ruling below, a preemption defense may be defeated by state rules of appellate practice that uphold any general verdict so long as the evidence would support a verdict on another basis

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* AAR states that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than AAR or its members made any monetary contribution to its preparation or submission.

(even though there is no reason to surmise that the jury actually found liability on that basis). AAR's members have a strong interest in appellate vindication of federal preemption defenses and preventing their frustration by state law.

INTRODUCTION

As the petition for certiorari demonstrates, the Arkansas Supreme Court in the decision below nullified the constitutional limitations on punitive damages awards established in *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408, 424-25 (2003), and the state court's rulings stand in direct conflict with decisions of the United States Court of Appeals for the Ninth and Eleventh Circuits. Pet. 13-27. Furthermore, in upholding a general verdict where one of the presumed bases of the verdict was preempted by federal law, the state supreme court contravened the longstanding rule of *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884). Pet. 28-30.

These conflicts of decisional authority, and the broad importance of the questions presented for the vindication of federal rights in jury trials, alone justify certiorari. But review is particularly critical in this case, because the decision below as to both questions could result in arbitrary tort verdicts interfering with the efficient allocation of railroad resources in contravention of federal policy. State tort law plays but a limited role in a predominantly federally regulated, interstate industry. State court juries should not be allowed to impose punishment in excess of any legitimate state interest in retribution for or deterrence of specific conduct, or to impose liability on the basis of state law duties that are preempted by federal law. This Court should grant the petition.

BACKGROUND

Jury verdicts are a mechanism of regulation: "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236,

247 (1959). Punitive damages serve an even "broader function" than compensatory damages; "they are aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416.

The regulatory force of jury verdicts is of special concern, however, when they intrude upon areas exclusively regulated by federal law, and when they reflect only "'"a decisionmaker's caprice."'" *Id.* at 418. Both concerns are implicated here. The jury verdict in this case was based in part on a theory of liability that is preempted under the Federal Railroad Safety Act, 49 U.S.C. § 20106, but the railroad's preemption defense was improperly defeated by a state law of appellate practice. Moreover, unwarranted awards of massive punitive damages in contravention of *State Farm* not only violate defendants' due process rights against arbitrary deprivations of property, but also do violence to the federal regulatory scheme. Such awards distort railroad decisionmaking, and result in a "misallocation of scarce resources" that adversely affects railroad operations. See Selection and Installation of Grade Crossing Warning Systems, 60 Fed. Reg. 11,649, 11,651 (proposed Mar. 2, 1995).[2] To appreciate fully the importance of the issues raised by this case, it is necessary for this Court to consider the complex regulatory system that has evolved to promote safety at rail crossings.

1. There are a staggering number of railroad crossings in the United States. As of 2002, there were 152,453 public vehicle crossings. Fed. R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics: Final Report 2002* tbl.9-1 (2004), *available at* http://safetydata.fra.dot.gov/Objects/bull2002.pdf. Including private vehicle and pedestrian crossings, there were more than 252,000 crossings in total. In the Union Pacific ("UP") system alone, there are more than 29,000 public vehicle crossings, and over 48,000 total crossings. *Id.*

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[2] A "public grade crossing" is an intersection of a railway and a public road at the same level (as opposed to, for instance, an overpass). Fed. R.R. & Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972).

Beginning in the nineteenth century, state tort law placed on the railroads the burden of maintaining safe crossings. See *Cont'l Improvement Co.* v. *Stead*, 95 U.S. 161, 165 (1877). However, with the advent of the motor vehicle and rapid increases in highway traffic, it was soon recognized that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted); *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains & Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

Historically, the railroads lacked the resources to confront the mounting dangers posed by the increased vehicle traffic, and lacked the jurisdiction to regulate that traffic. Despite increased state, federal and railroad expenditures on crossing safety, U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 183 (2d ed. 1986), accidents rose to unacceptably high levels in the middle part of this century even as railroad line mileage declined. *Id.* at 2, 5 (annual fatalities from 1930-1970 ranged from 1200 to 2000). The 1960s brought a sharp spike in crossing fatalities, Fed. Highway Admin., U.S. Dep't of Transp., *Rail-Highway Crossings Study* 1-5 (1989), raising pressure on Congress to increase federal intervention to promote grade crossing safety.

Troubled by the statistical trend and other safety issues, and the inadequacy of haphazard state regulation,[3] Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"),

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[3] H.R. Rep. No. 91-1194, at 11 (1970) (expressing doubt that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

Pub. L. No. 91-458, 84 Stat. 971.[4] Its purpose was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. It directed the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 347 (2000). The statute included a broad preemption provision, in which Congress unequivocally declared that "[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, subject to a narrow savings clause, States may only "adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

Section 433 of FRSA specifically addressed rail-highway crossings. It required the Secretary to confront the grade crossing problem, and mandated that the Secretary prepare "a comprehensive study of the problem of eliminating and protecting grade crossings," including recommendations for appropriate action. 45 U.S.C. § 433 (repealed 1994).

In 1972, the Secretary of Transportation submitted the statutorily mandated study, and soon thereafter Congress enacted the Federal Railway-Highway Crossings Program. Pub. L. No. 93-87, tit. II, § 203, 87 Stat. 282, 283-84 (1973).[5] The

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[4] FRSA was originally codified at 45 U.S.C. §§ 421 to 447. As part of a broad reorganization of federal transportation laws, Congress formally repealed FRSA in 1994 and reenacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. This recodification was not intended to substantively change FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[5] Congress repealed section 203 of the 1973 Highway Safety Act and reenacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130. Surface Transportation and Uni-

Program makes federal funds available to States "for the elimination of hazards of railway-highway crossings," 23 U.S.C. § 130(a), and is premised on the recognition that the resources do not exist to ensure maximal safety at all crossings, so States must develop systems to prioritize projects and put safety resources to their highest use. Thus, to secure section 130 funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and "establish and implement a schedule of projects for this purpose." *Id.* § 130(d); U.S. GAO, GAO/RCED-95-191, *Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 14 (Aug. 1995).[6]

This federal approach to crossing safety, predicated on a systematic and data-driven analysis of accident risks that directs safety resources to crossings of highest need, has been a resounding success. Although both highway and rail traffic have increased, the section 130 program has contributed to a precipitous decline in crossing accidents and fatalities: from 12,000 accidents and 1500 fatalities at railway crossings in 1972, to 3077 accidents and 357 fatalities in 2002.[7]

2. In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court held that the "[l]egal duties imposed on railroads by the common law" are subject to preemption under FRSA if their subject matter is covered by DOT regula-

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form Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

[6] Because traffic control is not the responsibility of railroads, the Federal Highway Administration has determined that federal grade crossing improvements are of "no ascertainable net benefit to the railroads," 23 C.F.R. § 646.210(b)(1), (2), and thus railroads are not required to pay a share of the cost of such improvements.

[7] U.S. Dep't of Transp., *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* 2 (1996); *Railroad Safety Statistics*, *supra*, at tbl.1-1; *accord* Press Release, Fed. R.R. Admin., U.S. Dep't of Transp., Highway-Rail Crossing Fatalities Reach Record Low in 2003 (May 6, 2004), *available at* http://www.fra.dot.gov/us/press-releases/26.

tions. *Id.* at 664. The Court further held that the regulations implementing the section 130 program do not generally preempt a railroad's state tort law duties regarding warning devices at every crossing. *Id.* at 665-70. A specific federal regulation does govern the adequacy of devices installed with federal funds, however, and the Court ruled that this regulation, where applicable, preempts any state tort law duties of care in the selection of warning devices. *Id.* at 670-72.

Thus, after *Easterwood*, railroads remain subject to state tort law duties to ensure the safety of crossings not improved with federal funds, and even at federally improved crossings may retain certain duties (such as crossing maintenance) to the extent they are not covered by specific federal regulations. But even with this diminished role of state law, the Federal Railroad Administration still has lamented the risks to railroad safety created by large jury awards. Jury verdicts lead to "misallocation of scarce resources," causing limited funds to be spent on safety improvements "not where research and data indicates they will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed." Selection and Installation of Grade Crossing Warning Systems, 60 Fed. Reg. at 11,651. Such risks are dramatically enhanced when massive and arbitrary jury awards of punitive damages for crossing accidents go unchecked without regard for constitutional limits.

3. In 1971, the Secretary of Transportation invoked his authority to issue comprehensive regulations that govern maximum train speeds and which, pertinent here, apply to train crossings. Those regulations are now codified at 49 C.F.R. § 213.9. As the Court described them in *Easterwood*:

> Federal regulations ... codified at 49 C.F.R. § 213.9(a) (1992) set maximum allowable operating speeds for all freight and passenger trains for each class of track on which they travel. The different classes of track are in turn defined by, *inter alia*, their gage, alignment, curva-

> ture, surface uniformity, and the number of crossties per length of track. See §§ 213.51-213.143.

507 U.S. at 673. Because these regulations do not just establish maximum speeds, but do so on the basis of a variety of track conditions, they "should be understood as covering the subject matter of train speed with respect to track conditions, *including the conditions posed by grade crossings*." *Id.* at 675 (emphasis added). Accordingly, any claim based on excessive train speed is preempted under FRSA. *Id.*

In sum, state tort law has been entirely displaced in certain areas relating to railroad crossing safety. In other areas where tort law still imposes duties upon railroads, large and unwarranted damages verdicts pose a significant risk of misallocation of scarce resources. While the jurisprudential questions raised by UP's petition affect all state court defendants who are subject to large punitive damages awards, or have valid preemption defenses to state law damages claims tried to a jury, the malignant effects of the decision below on railroad operations and federal railroad policy in particular underscore the importance of this Court's review.

SUMMARY OF ARGUMENT

The verdict in this case—an astonishing $30.1 million, including $25 million of punitive damages—is premised on two interlocking errors that are worthy of review. First, the Arkansas Supreme Court's decision to uphold punitive damages flies in the face of this Court's decision in *State Farm*, and nullifies the bright-line rules and presumptions that this Court established as a check upon grossly excessive punishments imposed by juries. The state court's analysis of the due process guideposts established by this Court is deeply flawed and contrary to this Court's precedents, most notably its holding that any single-digit ratio of punitive to compensatory damages that is not "'breathtaking'" satisfies due process. Pet. App. 33a. The state court ignored this Court's holding that "[w]hen compensatory damages are substantial, then a lesser

ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *State Farm*, 538 U.S. at 425. This is only the latest example of state supreme court and federal appellate court rulings that, in absolute disregard of *State Farm*, uphold any ratio of compensatory to punitive damages less than 10:1, regardless of the absolute level of compensatory damages. The decision below, and those of likeminded courts, threatens to render *State Farm* a dead letter. This Court should grant review to bring the lower courts in line with its punitive damages precedents.

Second, the decision below conflicts with this Court's precedents regarding appellate review of general jury verdicts implicating federal rights. The verdict was premised on a theory of liability that is self-evidently preempted by federal law: The trial court permitted the jury to consider the Barbers' claim that UP was negligent in failing to enter a "slow order" to regulate the speed of trains at the crossing where the accident occurred—despite the fact that excessive speed claims are flatly preempted by federal regulation under FRSA. The Arkansas Supreme Court rejected UP's preemption challenge on appeal, improperly invoking a state rule of practice that allows a general verdict to stand even if tainted with legal error, so long as any other theory is legally supportable. This determination was contrary to binding precedents of this Court that establish the primacy of federal law, and it threatens the federal uniformity that FRSA was meant to ensure. This Court's review is imperative.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ON PUNITIVE DAMAGES CONTRAVENES *STATE FARM*.

This Court has repeatedly expressed "concerns over the imprecise manner in which punitive damages systems are administered." *State Farm*, 538 U.S. at 417.

> "[P]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."

Id. In light of these concerns, this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), established three guideposts for determining whether a punitive damages award is so grossly excessive that it violates due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the amount of punitive damages and comparable civil penalties. *Id.* at 575; *State Farm*, 538 U.S. at 418. In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), this Court held that appellate courts must review the trial court's application of the *BMW* guideposts *de novo*, for "[e]xacting appellate review ensures that an award of punitive damages is based upon an '"application of law, rather than a decisionmaker's caprice."'" *State Farm*, 538 U.S. at 418 (quoting *Cooper*, 532 U.S. at 436).

Far from "exacting appellate review" of the due process guideposts, the decision below is instead symptomatic of the cavalier disregard shown by numerous lower courts for this Court's landmark decision in *State Farm*. The petition comprehensively demonstrates the multiple flaws in the Arkansas Supreme Court's constitutional reasoning and its inconsistency with the precedents of this Court and other courts of appeals. Pet. 13-27. *Amicus* agrees with the petition's analysis, and will not repeat it here. There are two fundamental points of error in the decision below that bear emphasis, however, for they underscore the necessity of this Court's review.

1. The Arkansas Supreme Court wholly misconceived the analysis required by the reprehensibility guidepost, and its

opinion is fraught with analytical confusion. On the one hand, it acknowledges the requirement of *de novo* review of the *BMW* guideposts, Pet. App. 31a, but a few pages later holds in contradiction that "[w]e will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award," and will overturn an award only if it "shocks the conscience," *id.* at 36a, effectively assimilating *BMW* review to traditional excessiveness review under Arkansas law, see *id.* at 41a (Thornton, J., dissenting).

State Farm makes clear that the jury's factual determinations and the reviewing court's *de novo* constitutional inquiry are independent. The jury here found that UP acted with malice or in reckless disregard of the consequences. Pet. App. 6a. That finding is highly dubious, as the dissent recognizes. The state highway department never required or suggested additional safety devices at the crossing; there was no evidence of prior accidents; and "Union Pacific entered into a contract with Tweedy Contractors to clear the vegetation four months prior to the accident, specifically taking affirmative steps to remedy any vegetation problem at Crossing 123, thereby demonstrating a lack of malice." *Id.* at 41a-42a (Thornton, J., dissenting). Moreover, although two witnesses testified to near-misses when approaching the crossing from the same side as the plaintiff did here, it is undisputed that UP received no notice of those near-misses, *id.* at 15a-18a, and thus could not have acted in conscious disregard of a known risk that vehicles were entering the crossing unaware of an approaching train because of excess vegetation.

But even when (as here) the reviewing court is inclined to uphold a jury finding of recklessness, that does not end the constitutional inquiry. Under the reprehensibility guidepost, the court still must determine "'the reasonableness of [the] award'" based on "'*the degree* of reprehensibility of the defendant's conduct.'" *State Farm*, 538 U.S. at 419. "[P]unitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*,

is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (emphasis added). Thus, *State Farm* requires the Arkansas Supreme Court to determine, *de novo*, that the reprehensibility was of such a degree that the state's legitimate interests in deterrence and retribution would reasonably demand an additional fine of $25 million, beyond the inherent deterrent effect of $5.1 million in compensatory damages. Here, UP's conduct was low on the scale of reprehensibility by any measure; its putative recklessness consisted of a failure to expedite the performance of an existing vegetation removal contract despite knowledge of complaints that the vegetation at the crossing was excessive. Pet. App. 2a, 41a-42a. The state court simply never undertook the proper *de novo* inquiry as to whether such conduct warrants a $25 million punishment in addition to the substantial payment of millions of dollars in compensatory damages.[8]

2. The Arkansas Supreme Court's ruling also directly contravenes *State Farm* in regard to the second constitutional guidepost of the disparity between punishment and harm. In *State Farm*, this Court admonished that although the Due Process Clause does not mandate precise mathematical formulas, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. The Court noted its prior declarations that a ratio of 4:1 "might be close to the line of constitutional impropriety," but recognized that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* Importantly, this Court noted that "[t]he converse is also true, however. When compensatory damages are substantial,

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[8] The court below is not the only one to circumvent *State Farm* in this fashion. *See In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1097 (D. Alaska 2004) (upholding $4.5 billion punitive damages award in part on the theory that the defendant "willfully allowed" the harm-causing conduct).

then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* Because the compensatory damages in *State Farm* of $1 million were "substantial," the underlying conduct, although intentional (namely, fraud and intentional infliction of emotional distress, *id.* at 414-15), at most "would justify a punitive damages award at or near the amount of compensatory damages," *id.* at 426, 429.

State Farm dictates the result here. The Barbers were awarded $5.1 million in compensatory damages. Given that the $1 million award in *State Farm* was "substantial," the much larger award in this case is *a fortiori* substantial. Thus, even if the conduct alleged here were, as in *State Farm*, intentional, at the very most it would only "justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429. Indeed, the logic of *State Farm* is that (for a given level of conduct) the greater the burden of compensatory damages, the lower the constitutionally permissible ratio should be. Absolute dollars matter as well as ratios in determining whether a punitive award fulfills legitimate state interests in punishment and deterrence, and there may be cases where even a 1:1 ratio is grossly excessive.

But instead of vacating the punitive damages award or, at most, limiting such damages to a figure "at or near the amount of compensatory damages," the court below upheld punitive damages *five times greater* than the compensatory damages award: $25 million. It treated *State Farm* as effectively creating a safe constitutional harbor for single-digit ratios, and devised an unwarranted and amorphous rule that a single digit ratio will satisfy the disparity guidepost unless the result is "'breathtaking.'" Pet. App. 33a. The state court simply disregarded the presumption set forth in *State Farm* that ratios in excess of 1:1 will typically exceed due process limits where compensation is substantial.

The award of punitive damages in this case is manifestly unconstitutional, and it is emblematic of the manner in which

lower courts have failed to heed *State Farm*. In just the past few months, the Ninth Circuit and the Utah Supreme Court have brazenly disregarded *State Farm*, and affirmed punitive damages awards that are multiples larger than underlying, multimillion-dollar compensatory verdicts. In *State Farm II*, the Utah Supreme Court ignored on remand this Court's statement that the punitive damages "'likely'" should be "'at or near the amount of compensatory damages'"—approximately $1 million—and instead awarded over $9 million in punitive damages. *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, __ P.3d __, 2004 WL 869188, at *1-*3, *9-*10 (Utah Apr. 23, 2004), *petition for cert. filed*, No. 04-116 (U.S. July 20, 2004). The Ninth Circuit likewise ignored *State Farm*, instead embracing the remarkable proposition that "State Farm's 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004).

In similar fashion, the Eighth Circuit upheld a punitive damage award of $10 million on the counterintuitive theory that that award was in fact "at or near" the compensatory damage award of $2.4 million. *Eden Elec., Ltd.* v. *Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004) (citing *State Farm*, 538 U.S. at 419-20). Likewise, the Federal Circuit has upheld punitive damages of $50 million on top of compensatory damages of $15 million. *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1423 (2004). And the Arkansas Supreme Court has itself previously upheld punitive damages of $21 million above a compensatory award of $5 million. *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 361, 363 (Ark.), *cert. denied*, 124 S. Ct. 532 & 535 (2003). Other courts have similarly ignored *State Farm*.[9]

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[9] *E.g.*, *In re Exxon Valdez*, 296 F. Supp. at 1101, 1110 ($4.5 billion punitive; approximately $513 million "total actual harm"); *Interclaim Holdings Ltd.* v. *Ness, Motley, Loadholt, Richardson & Poole*, 298 F. Supp. 2d

This disregard of *State Farm* is all the more important in the specific context of rail crossings. Transportation markets are competitive and railroad operating margins are quite thin. See *R.R. Revenue Adequacy—2003 Determination*, STB Ex Parte No. 552 (Sub.-No. 8) (STB Aug. 12, 2004) (finding that no major U.S. rail system earned the industry cost of capital during 2003). The payment of massive, multimillion-dollar punitive damages awards that exceed any reasonable deterrent purpose simply takes money from other vital needs, such as capital upgrades or other infrastructure improvements. If the failure to act immediately upon public complaints regarding certain crossing conditions can be transmogrified into recklessness on the thin evidence presented here, then as a protective measure railroads will be forced to expend scarce resources to act upon any such complaints, even where spending is unwarranted. This is exactly the arbitrary overdeterrence by juries exercising the power of punishment under state law that *State Farm* was supposed to end. 538 U.S. at 417 ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

Furthermore, because of the sheer, violent force of collisions between moving trains and vehicles, injuries from crossing accidents are often devastating and frequently fatal. Accordingly, compensatory awards in the millions of dollars are not uncommon. If any ratio less than 10:1 that is not "'breathtaking'" as a matter of judicial hindsight presumptively passes constitutional muster, Pet. App. 33a, then the Due Process Clause provides scant protection for railroads from capricious punitive damages verdicts in the tens of millions of dollars. This Court should grant review to vindicate the constitutional limitations set forth in *State Farm* and restore rationality in the enforcement of state tort law against railroads.

746, 748, 765 (N.D. Ill. 2004) ($27.7 million; $8.3 million); Pet. 15 n.8 (cataloguing verdicts).

II. THE INVOCATION OF STATE RULES OF PRACTICE TO DEFEAT FEDERAL RIGHTS CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari should be granted for a second reason. At trial, the Barbers proceeded on multiple theories of negligence, including two theories related to the speed of the train—namely, that the train was operated at an excessive rate of speed, and that UP should have ordered the train to proceed more slowly. The trial court reached the extraordinary conclusion that only the former theory, and not the latter, was preempted under FRSA. Abs. 41; Pet. App. 5a. Plaintiffs' theory of negligent failure to issue a slow order was plainly preempted by federal speed regulations that cover the subject matter of train speed, *supra* at 7-8, and the trial court's conclusion to the contrary was both erroneous, and in conflict with the decisions of numerous courts.[10]

The Arkansas Supreme Court, however, declined to reach this issue. It concluded, instead, that because the jury had issued a general verdict, and because the jury had been pre-

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[10] A slow order plainly regulates train speed—it is an internal rule, set by a railroad, by which its trains are ordered to proceed more slowly because of track conditions. As such, the supposed failure to issue a slow order is preempted by *Easterwood*, which held that the federal speed regulations "cover[] the subject matter of train speed with respect to track conditions." 507 U.S. at 675. Both the Eighth Circuit and the Oklahoma Supreme Court have recognized as much, in direct conflict with the trial court's ruling below. *St. Louis S.W. Ry.* v. *Pierce*, 68 F.3d 276, 278 (8th Cir. 1995); *Hightower* v. *Kansas City S. Ry.*, 70 P.3d 835, 848-49 (Okla. 2003); *Myers v. Missouri Pac. R.R.*, 52 P.3d 1014, 1023 (Okla. 2002). Nor would any slow order claim fall within the possible exception recognized in *Easterwood* for claims based on a "duty to slow or stop a train to avoid a specific, individual hazard." 507 U.S. at 675 n.15. Courts correctly have recognized that "a specific, individual hazard" "'refers to a unique occurrence which could lead to a specific and imminent collision *and not to allegedly dangerous conditions at a particular crossing.*'" *Hightower*, 70 P.3d at 847-48; *Macfarlane* v. *Canadian Pac. Ry.*, 278 F.3d 54, 59 (2d Cir. 2002); *Herndon* v. *Nat'l R.R. Passenger Corp.*, 814 A.2d 934, 937-38 (D.C. 2003).

sented with multiple theories of negligence, the verdict must be upheld even if one of the underlying theories was flawed: "We cannot determine, and we will not speculate, upon which theory the general verdict of negligence was premised.... Hence, we must affirm." Pet. App. 20a.

That ruling conflicts squarely with this Court's governing precedent, which holds that where there is a general verdict and error was committed on any one issue of federal law underlying that verdict, then an inability to determine the jury's precise theory of liability means that "the verdict cannot be upheld." *Baldwin*, 112 U.S. at 493; *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) ("Since we hold erroneous one theory of liability upon which the general verdict may have rested ... it is unnecessary for us to explore the legality of the other theories."); *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959); *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 78-79 (1907).

It is of no consequence that the Arkansas Supreme Court purported to employ a state procedural rule, for it has long been recognized that a "'federal right cannot be defeated by the forms of local practice.'" *Felder* v. *Casey*, 487 U.S. 131, 138 (1988); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) ("the assertion of federal rights ... is not to be defeated under the name of local practice"); see also Pet. 29-30. Not coincidentally, this principle developed in railroad litigation, where federal preemption is commonplace, and national uniformity is essential. See, *e.g.*, *Davis*, 263 U.S. at 24; *Brown* v. *W. Ry.*, 338 U.S. 294, 299 (1949) (FELA case; acknowledging the "desirable uniformity in adjudication of federally created rights").[11]

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[11] Similarly, in order to ensure uniformity in litigation under FELA, this Court has held "that questions concerning the measure of damages in an FELA action are federal in character," *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980); that the "validity of releases under [FELA] raises a federal question to be determined by federal rather than state law," *Dice* v.

Moreover, this Court has specifically ruled on the manner in which state courts evaluate—or refuse to evaluate—federal issues on appeal and it has reaffirmed the general principle set forth above: "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail." *Love* v. *Griffith*, 266 U.S. 32, 33 (1924); *accord Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304 (1964).

Review of this issue is particularly important because the decision below undermines the national policy established in FRSA. Congress granted the Secretary of Transportation broad powers to regulate railroad safety, 49 U.S.C. § 20103(a), and declared that state law on any subject matter covered by the federal regulation is preempted (absent special circumstances not present here), *id.* § 20106. Preempted state law includes state tort law duties, *Easterwood*, 507 U.S. at 664, and indeed it is in tort cases that FRSA preemption most commonly comes into play. Under the rule below, however, a plaintiff may try multiple theories of negligence to a jury, secure a general verdict based on a breach of a preempted state law duty, and yet evade appellate review so long as another theory survives the lenient state law standard for sufficiency of evidence (regardless of whether the jury in fact found liability under that theory). As a result, railroads cannot safely conform their conduct to federal speed regulations without risk of massive state law liability, as FRSA intends. The ruling below is thus not only in conflict with this Court's precedents, but also undermines the uniformity of federal law by thwarting appellate review of federally preempted state tort law.

Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952); that restrictive state pleading standards cannot govern FELA cases, *Brown*, 338 U.S. at 298-99; and that the sufficiency of the evidence in a negligence claim under FELA is a question of federal law, *Brady* v. *S. Ry.*, 320 U.S. 476, 479 (1943).

Certiorari is further warranted because this case provides an opportunity for this Court to provide needed clarity about the appropriate treatment of general verdicts. As noted above, the Court has clearly stated that, when a general verdict rests upon an erroneous theory and it cannot be determined whether the jury relied upon that theory in reaching its verdict, the verdict must be overturned. *Baldwin*, 112 U.S. at 493. However, there is a mature and acknowledged circuit split over whether (and under what circumstances) such an error may be deemed harmless. See *Davis* v. *Rennie*, 264 F.3d 86, 105 (1st Cir. 2001) (recognizing the circuit split).[12]

The First, Second, Third, and Seventh Circuits have employed harmless error analysis, in which they consider whether there is a substantial probability that the same verdict would have been reached absent the error. *Davis*, 264 F.3d at 105; *Bruneau ex rel. Schofield* v. *S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998); *Hurley* v. *Atl. City Police Dep't*, 174 F.3d 95, 121-22 (3d Cir. 1999); *McGrath* v. *Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981). Among these courts, however, only the Seventh Circuit has adopted the approach of the court below—namely, to place the extraordinary burden on the party challenging the verdict to demonstrate that *each* underlying theory of liability was infected with error, see *id.* This is a "maverick" rule, which has been roundly criticized as "contraven[ing] Supreme Court authority," *Kern* v. *Levolor Lorentzen, Inc.*, 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting), and it is precisely the same rule employed below. Pet. App. 19a-21a.

By contrast, the Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have followed *Baldwin* and its progeny

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[12] Other authorities to recognize this decisional conflict include *Kerkhof* v. *MCI Worldcom, Inc.*, 282 F.3d 44, 52 (1st Cir. 2002); *Kern* v. *Levolor Lorentzen, Inc.*, 899 F.2d 772, 790-92 (9th Cir. 1990) (Kozinski, J., dissenting); and Ryan Patrick Phair, *Appellate Review of Multi-Claim General Verdicts: The Life and Premature Death of the* Baldwin *Principle*, 4 J. App. Prac. & Process 89 (2002).

strictly, and have held that an error underlying a general verdict requires outright reversal. *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) ("where a jury has returned a general verdict and one theory of liability upon which the verdict may have rested was erroneous, the verdict cannot stand"); see *Ely* v. *Blevins*, 706 F.2d 479, 480 (4th Cir. 1983) (per curiam); *Nowell ex rel. Nowell* v. *Univ. Elec. Co.*, 792 F.2d 1310, 1312 (5th Cir. 1986); *Elder-Beerman Stores Corp.* v. *Federated Dep't Stores, Inc.*, 459 F.2d 138, 147-48 (6th Cir. 1972); *Bone* v. *Refco, Inc.*, 774 F.2d 235, 242-43 (8th Cir. 1985); *Torcise* v. *Cmty. Bank of Homestead (In re Torcise)*, 116 F.3d 860, 869 (11th Cir. 1997).[13] For these reasons, this case provides an opportunity to bring needed clarity to an issue infected with confusion in the circuit courts.

* * * *

In recent years, this Court repeatedly has recognized the constitutional and practical dangers that flow from arbitrary and unchecked punitive damages awards. That danger is particularly acute where railroads are concerned, because safety on the Nation's railroads and at public grade crossings is a matter of extensive federal regulation. To allow, as here, tens of millions of dollars in punitive damages to be added to a multimillion-dollar compensatory award, and to permit state appellate procedures to insulate such an award from review, is to permit capricious damages awards to undercut the regulatory framework established by Congress.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for certiorari, this Court should grant the petition.

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[13] The Ninth Circuit has taken yet a third approach, pursuant to which it will "'attribut[e]'" a general verdict to one of the non-erroneous theories underlying it, if the case satisfies a four-factor test. *Counts* v. *Burlington N. R.R.*, 952 F.2d 1136, 1140 (9th Cir. 1991); *cf. Kern*, 899 F.2d at 790-92 (Kozinski, J., dissenting) (criticizing the Ninth Circuit test).

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